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No. 991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JERRY G. SUMMERLIN,
Petitioner

against

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

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Petitioner presents his petition for a rehearing of this Court's order dated May 3, 1965, denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and therefore respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for writ of certiorari was denied without opinion. Petitioner herein submits that the failure of the trial court below to grant a severance of petitioner's trial from that of his co-defendant was manifest error; that this error on the part of the trial court below so prejudiced petitioner and his fundamental rights before

the jury, that this error could not be cured by the Court in its instructions, nor was the same so cured, before the case was submitted to the jury for its deliberations.

The failure of the Court to instruct the jury properly with respect to petitioner's defense of alibi was error, which deprived petitioner of his fundamental rights and due process under the Fifth Amendment to the Constitution of the United States. This deprivation of petitioner's fundamental rights was compounded by failure of his defense counsel to seek proper instructions by the trial Court to the jury and by his trial counsel's failure to object properly and timely to the Court's instructions to the jury. This, it is submitted, is not only plain error, but were conditions and circumstances in the trial of this case, which deprived petitioner of his rights under the Sixth Amendment to the Constitution of the United States.

A reasonably careful review of the record in this case, petitioner contends, clearly reveals that he was, indeed, deprived of his basic and fundamental rights under the Sixth Amendment to the Constitution of the United States. The record is replete with inactivity and instances and acts of omission on the part of this petitioner's trial defense counsel, during trial, which in actuality were tantamount, not only to representation by incompetent counsel in this case in violation of his rights under the Sixth Amendment, but further, petitioner was subjected to representation by trial defense counsel, who not only failed to adequately assist him, but actually prejudiced his rights. This fact is seen by the lack of cross-examination indulged in by petitioner's defense counsel; and further when his defense counsel did cross-examine government witnesses to the limited extent indulged in by them, they not only failed to help his cause and case, but actually harmed him by prejudicing his

rights and position in this case, by their inept cross-examinations.

It is remarkable that in the brief of the Government in opposition to petitioner's petition for writ of certiorari (Opp. 3) wherein a statement is made that witnesses saw petitioner "remove the stocking mask", when actually the record does not support this unequivocal statement.

POINT I

The Government's brief (Opp. page 3) contains the following,

> "Witnesses saw petitioner running from the store, carrying the two brown attache cases, and also saw him remove the stocking mask and transfer one of the attache cases to another person about two blocks from the sandwich shop. (Tr. 64-70, 84-89, 117-118)."

Petitioner submits that a careful and articulate examination of the transcript above, does not reveal any testimony by any witness which states that petitioner removed "the stocking mask" as stated therein. The nearest approach to such an unequivocal statement by the Government, that petitioner removed "the stocking mask" seems to be a statement by a witness responding on direct examination as follows (Tr. 66),

> "A. I seen another guy come through the parking lot, running. He throwed something down out of his hand."

and subsequently on cross-examination as follows (Tr. 70-71)

> "A. They throw it down at the light pole. I saw him drop something out of his hand when the other one came from the parking lot, but I didn't know what it was."

Petitioner submits that there is nothing else in the entire record in this case which supports the Government's unequivocal statement (Opp. 3) that witnesses saw him "remove the stocking mask". It is obvious that this garbled testimony of the Government witness (Tr. 66),

> "A. I seen another guy come through the parking lot, running. He throwed something down out of his hand."

and Tr. 70-71

> "A. They throw it down at the light pole. I saw him drop something out of his hand when the other one came from the parking lot, but I didn't know what it was."

is conflicting in itself, and had no meaning to help the jury determine the issue raised by the alleged mask and its removal, attributed to petitioner herein. This prejudice concerning the alleged mask and its alleged removal by petitioner herein was totally unsupported by any adequate or probative evidence introduced into the trial of this case, and this damaging inference permeating the minds of the jury, unsupported by evidence, was not cured by the Court. This damage to petitioner's rights was compounded by the subsequent admission into evidence of a nylon stocking mask, brought into this trial to the prejudice of petitioner herein, and at the insistence of counsel for co-defendant Garrett. Consequently petitioner urges that this incurable harm to his rights was never corrected nor sought to be corrected by the Court, and the resulting prejudice to him was reflected in the verdict of the jury.

POINT II

Petitioner submits that as urged before, the failure of the trial Court to grant a severance *sua sponte* during the course of the trial or at the conclusion of the Gov-

ernment's case in chief constituted error in violation of petitioner's rights under the Fifth Amendment's due process clause. Petitioner urges further, that in the light of the Government's case in chief against petitioner and the co-defendant, which resulted in the trial Court's directing a judgment of acquittal on all counts of the indictment against the co-defendant Garrett, created a condition and climate which warranted the trial Court in directing that the case against petitioner should not proceed any further and that a mistrial should have been declared therein. This is urged, since the minds of the jurors were filled with testimony damaging to the rights of the petitioner herein, which was elicited on cross-examination by counsel for the co-defendant Garrett, and not objected to by petitioner's own defense counsel. Petitioner submits that counsel for co-defendant Garrett during the entire trial not only dominated cross-examination of Government witnesses, but skilfully manipulated the same so as to exculpate the co-defendant from any and all blame or criminal activity with respect to any of the five counts contained in the indictment and place the onus of alleged criminal activity as to all counts of this indictment upon petitioner herein. It is submitted that the trial Court below should have not permitted this to exist or obtain and accordingly should have declared a mistrial at the conclusion of the Government's case in chief; or at least, petitioner submits that since the Court did not see fit during the course of the presentation of the Government's case in chief to order a severance with respect to the trial of petitioner herein a mistrial should have been declared by the trial Court. See the case of *Bollenbach* v. *United States*, 326 P. S. 607, 612 (1946) and *Wrightson* v. *United States*, 22 F 2d 556, 95 U. S. App. D. C. 390.

POINT III

The petitioner's defense of alibi was not sufficiently explained to the jury by the trial Court below. Petitioner submits that since he offered evidence of alibi and took the witness stand himself to buttress his defense, that it was incumbent upon the trial Court below to fully protect his rights by making clear to the jury the full import and meaning of his defense in this case. In this connection, petitioner submits that he was entitled to special and specific instructions with respect to his defense of alibi even if it necessitated a reasonably lengthy and detailed explanation of the same by the Court in its instructions to the jury. Petitioner was entitled to have his defense and his position in this case explained to the jury as clearly and unequivocally as any other facet of the trial was explained and detailed to the jury by the Court in its instructions. Failure to do so by the trial Court, petitioner submits was error. Petitioner urges again that the jury should have been thoroughly advised of the two different narratives given at the trial of this case respectively on behalf of the Government and on behalf of the petitioner so that they could occupy equal footing before the jury during its deliberations and in the evaluation of the same. See *Reavis* v. *United States*, 93 F 2d 307 CCA—10th (1937) and *MacFarland* v. *United States*, 174 F 2d 538, 85 U. S. App. D. C. 19 (1949) and *Cline* v. *United States*, 20 F 2d 494, CCA—8th (1927).

POINT IV

Petitioner urges that his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States were violated and prejudiced due to the ineptness and incompetency of his defense counsel during the trial of this case in the Court below. It is obvious and fundamental that no where does this record reveal

that counsel for the co-defendant Garrett was counsel for petitioner herein, nor was he ever hired or commissioned by petitioner to act as his counsel in this case. Hence, petitioner submits his trial counsel were duty bound to be vigilant and alert during all stages and proceedings of the trial in order to protect his rights and to defend him, the petitioner, and him alone.

Petitioner submits that references in the Government's brief (Opp. 4-7) suggest that counsel for co-defendant Garrett actually aided and assisted petitioner in his defense in the trial below. With respect to these references, inferences and statements, of course, petitioner can not agree in any measure and accordingly does not agree with the same. On the contrary, petitioner urges that due to his defense counsel's indifference to his rights, and ineptness, and yes, even practically their refusal to protect his rights with timely objections and by allowing Garrett's defense counsel to exculpate the co-defendant Garrett from alleged responsibility for criminal activity in all five counts of the indictment at the expense of throwing all of the onus of alleged criminal activity on the back and person of petitioner herein, all to his detriment, did, indeed, prejudice petitioner and deny unto him his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States. The transcript references in the Government's brief in opposition (Opp. 7) referring to alleged extensive cross-examination of Government witnesses by petitioner' defense counsel cover only 27 and one-half pages out of a transcript of record and proceedings containing 686 pages. It is submitted that this is minimal cross-examination, indeed, in light of the serious charges contained in the five counts of the indictment against petitioner herein. An examination of the record unequivocally reveals that such cross-examination was not extensive at all, the statement contained in the brief of the Government (Opp. 7) to the contrary notwithstanding.

It is submitted that petitioner should not suffer, nor should he be prejudiced or denied his rights under the Fifth and Sixth Amendment to the Constitution of the United States because of the indifference of, or the lack of competence of his defense counsel. See the cases of *Minker* v. *United States*, 85 F 2d 425, *Nigro* v. *United States*, 117 F 2d 624, 133 A.L.R. 1128 and *Payton* v. *United States*, 222 F 2d 794, 96 U.S. App. D.C. 1.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JOSIAH LYMAN
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58, Subdivisions 1. and 2. of the Rules of this Court.

JOSIAH LYMAN
Attorney for Petitioner

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